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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. [redacted] 28

MAXINE K. HINKLE, Administratrix of the Estate of W. Max Hinkle, Deceased, and MAXINE K. HINKLE,
Petitioners,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR REHEARING.

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IN THE

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OCTOBER TERM, 1958.

No. 714.

MAXINE K. HINKLE, Administratrix of the Estate of W. Max Hinkle, Deceased, and MAXINE K. HINKLE,
Petitioners,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR REHEARING.

The Petitioners respectfully petition the Court for a rehearing under Rule 58, on the decision made herein on November 10, 1958, dismissing the certiorari as "improvidently granted". Oral Argument, set for October 21, was belatedly moved forward a week, and Petitioners did not have time after they learned of the change to print a Reply Brief, and thus the Court overlooked the follow-

ing, including Public Law 513, 85th Cong., 2d Session, H. R. 11102:

1. The case involved the following principles the settlement of which *IS* of the greatest public importance as distinguished from that of the parties:

I.

Removal by a corporation does not fall within the Judicial Power of the United States, and the case should be remanded, as a corporation is not a citizen of any state, and the case was not "between citizens of different states".

Marshall v. *B. & O. R. R. Co.*, 16 How. 314, 14 L. Ed. 953. See our argument on page 45, Brief for Petitioners.

1. The stipulation signed by the parties appearing on page 1, Transcript of Record, does not waive the jurisdictional facts, and is equivalent to the situation in Rexford v. Brunswick-Balke Co., 228 U.S. 339, where the distinction was made as follows:

   a. "The existence of diversity of citizenship, or other equivalent condition of jurisdiction, is fundamental; the want of it will be taken notice of by the court of its own motion, and *cannot be waived* by either party."

      Powers v. *Chesapeake & Ohio Railway Co.*, 168 U.S. 92, 98, and quoted with approval by Mr. Justice Van Deventer in Rexford case, *supra*.

After certiorari was granted in this case, the Congress recognized the importance of the fact that a corporation was not a citizen, by amending Title 28, U. S. Code, section 1441, and inserted in said amendment, effective as to

actions commenced after July 25, 1958, that a corporation shall be considered a citizen of the state where incorporated and the state where it has its principal place of business for the purpose of diversity jurisdiction. See, Wisconsin Bar Bulletin, August, 1958, page 74; Public Law 513. 85th Cong., H. R. 11102. The Act became effective July 25, 1958, and thus has no direct bearing on the case at bar, except it shows the Congress considered that heretofore a corporation was not a citizen, otherwise such legislation would be a useless act; and it further shows that the corporations and their "public relations departments" predicted that this Court would hold herein that they were not citizens for removal purposes, so they thought it of public importance to take care of the matter for the future.

Such Act of Congress makes this proposition as to citizenship of corporations more important to the public than before, not only that it demonstrates that such legislation was necessary, but it is an attempt of Congress to enlarge the judicial power defined in Article III, section 2 by definition. Unless this Court decides herein that prior to this Act a corporation was not a citizen for removal purposes, it perhaps will never have an opportunity to check the tendency of Congress to enlarge such jurisdiction by definition as limited in *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 333 U.S. 860.

To so hold is of public importance further because 60 per cent of the cases in the federal district courts are due to diversity, See American Bar Association Journal, March, 1958, and most of these, removals by corporations, accompanied with all the evils pointed out in discussing the Tompkins case. By holding the obvious herein, the Court can eliminate about 60 per cent of its crowded docket.

We submit, that for the reasons above the Court should hold that a corporation was not a citizen for re-

moval purposes, prior to July 25, 1958, and thus leave open the constitutionality of the late Act, the answer to which is obvious under the *Tidewater case*, 333 U.S. 860.

II.

Most insurance companies use interim contracts worded in legal effect similar to the one at bar, and extract from those who get policies more than 42 million dollars a year for interim premiums, and it is of public importance that these people get something for their 42 million dollars annually.

The importance to the public of insurance companies throughout the nation misleading and disappointing the public with contracts of the type sued upon is pointed out in the dissenting opinion filed in the Circuit, and appears on page 96, Transcript of Record, and although Petitioners failed to point out this importance under one heading in their Brief, they did point out the public importance of each of their four contentions by stating at the end of each what the federal rule should be as to each, and why such was important.

As shown by the prevailing opinion, see Transcript of Record, page 88, and their citation from 2 A. L. R., this type of contract is a national problem, and whichever of the four types mentioned therein is used, somebody is paying a premium, when he gets a policy, for back insurance that he did not have.

The contracts in these various circuits cited in the briefs on both sides were not different, as contended by Respondent. They did not contain the exact words, but the intent of the companies in each was exactly the same, as follows:

First clause: There is in each an insuring clause, at least designed to make the insured believe that if he pays on the date of the application his insurance takes effect at some named date prior to delivery of the policy.

This first clause in the case at bar was definite and was not ambiguous, "the insurance applied for is in full force from this date".

In the Iowa Reynolds case this first clause was somewhat less definite, but could be understood to take effect on the date of the physical examination. In the Gault case in the Second Circuit this first clause was not so clear, but could have been construed by an insured to be effective prior to the issuance of the policy; and the same is true as to the first clause in the case in the Sixth Circuit.

Second clause: The catch in each of these contracts is in the second clause, which is not stated in the same words, but the design in each is exactly the same, namely to state a "proviso", or condition, which is impossible of happening until a policy is approved by the company, if this second clause is interpreted the way an "insurance underwriter would interpret it." For example, the second clause in the receipt in the Sixth Circuit said, "provided a policy is delivered to the insured or his representatives", and the one in the Second Circuit said, "if the company is satisfied that the applicant is insurable on" * * * the date of his physical examination, whereas the one at bar says, "provided satisfactory evidence that he is insurable for the amount, plan and rating applied for is received at the home office", and in all the cases the insurance companies contend that such second clauses make it impossible for the insurance to be effective until they decide to issue a policy, at least. In other words, they are attempting to make it absolutely impossible for the insurance to be ef-

fective until they issue the policy, but at the same time they attempt to make it possible when they deliver the policy to collect premium from the prior named date, in the one at bar, the date of the application, in Reynolds, the date of the physical examination. But the intent is the same, to lead insured to believe he has immediate insurance, thus to collect a premium over a period prior to the policy, and still not be liable if the party dies before he gets, or they determine to issue, a policy. This second clause is of the greatest public importance, because of the large amount of premiums collected from people who do get their policies, when in fact they are paying for something that did not exist. We will point out later by statistics the millions of dollars the insurance companies in the whole nation collect in any one year from people who do get policies, which makes them pay for insurance that did not exist. It is a national problem of interest to the millions of men each year who take out insurance, of interest to every insurance company in America to know whether such decisions as the Nertney case in Iowa, can be circumvented in the federal courts, and in which states and in which Circuits they can thus play "heads I win, tails you lose" with these contracts, and in which ones they can not, and we submit that it is of enough interest to all America that it can not be permitted anywhere, as decided in the Iowa Nertney case, and intimated in the Gault case.

Third clause: These contracts have a similar third clause, which is either another condition that is impossible of happening, if interpreted by an insurance underwriter, or is in the nature of a defeasance clause. The prevailing opinion of the Court of Appeals treated the one at bar as a defeasance clause, similar to the third clause of the Reynolds, Iowa, case, without noticing that it was in the disjunctive and not the conjunctive, as in the Reynolds case. The

trial court was a little more observing, and noticed the difference, the disjunctive, and thus held it had no application which obviously is more accurate than the Appeal Court, and makes no difference here, as we are merely illustrating that all this type of contracts are the same as far as their ultimate facts according to their legal effect is concerned. The only difference in the case at bar and the cases in the other circuits is that the legal effect of the first clause in all the others is that it is ambiguous as to whether the insurance is in effect at once, whereas in the one at bar, there is no ambiguity in the first clause, it states positively that it is in full force "on this date". If the difference were the other way, the decisions in the other two circuits would not be in conflict with this decision, but since this first clause is not ambiguous, like the first clauses in the other two circuits, the opinion is in conflict with those two circuits, because if those circuits will hold the insurance in effect with an ambiguous first clause, they would hold it equally in effect where the first clause is so plain and so unambiguous, so definite that it is in "full force and effect as of this date".

But when we say the first clause is not ambiguous, such does not mean that the entire contract is clear and needs no interpretation. Obviously the second clauses in all these contracts contradict the first clauses. Words and clauses are "ambiguous", clauses contradict each other, and thus make the meaning of the whole contract uncertain or misleading, sometimes called making the contract as a whole "ambiguous", but "uncertain" or "misleading" is the better term when applied to the whole, although most courts use the term "ambiguous", when clauses contradict each other. In such a situation, the Reynolds case, the Gault case and the case in the Sixth, read the first clause the way a person inexperienced in insurance would read it, ignored the second

clause because it "contradicted" the first clause, and held the company liable because they were dating the premium back. Such holding by those courts is a determination of the applicable state law. The Iowa Supreme Court has determined the Iowa law to be the same, as follows:

d. Where the policy covers the risk from the date of the application, it is apparent that the insured pays for insurance from the stipulated period beginning with the application, not the date of its acceptance * * *. The injustice of saying that, on the acceptance of the application, the insured has had protection from the prior date where no loss occurred, where it is also said that he is not protected if a loss did occur, is plain."

Nertney v. *Nat. Fire Ins. Co.*, 199 Iowa 1358, 203 N.W. 826.

To the same effect in life insurance is a statement in *Reynolds* v. *N. W. M. Life Ins. Co.*, 189 Iowa 76, 176 N.W. 207.

a. "Under the well recognized rule, it (a writing) is to be construed against the author of it, rather than in his favor."

Central N. R. Fire Ins. Co. v. *Omaha L. Ins. Co.*, 194 Iowa 255, 189 N.W. 723.

b. "Where one who drafts a document uses ambiguous language, or fairly admitted of more than one construction, the meaning to give it is that in which they were understood by the other party."

Minnesota Linseed Oil Co. v. *Montague & Smith*, 65 Iowa 67, 21 N.W. 141.

c. "Court should interpret a contract in the light of the purpose of the buyer in entering into it."

McCormick Harvesting Machine Co. v. *Williams*, 99 Iowa 601, 68 N.W. 607.

These Iowa decisions hold the same as Judge Hand held the state law to be in the Gault case, and thus the Eighth and Second circuits are in conflict.

We respectfully submit, that all these contracts are in legal effect alike, and they present an important problem to the entire public, this certiorari is in behalf of all those who have policies, and is against all the insurance companies in America, to determine whether the millions paid in back premiums when a policy is delivered, have been an "unjust enrichment" to the insurance world.

The public records of the Insurance Department of the State of Iowa show that the total amount of life insurance written in the state by all insurance companies in the year 1954 (the year that was just completed at the time this receipt, Exhibit 1, was delivered) was $637,288,000, or in round figures 637 million dollars. The defendant company in that year delivered $2,514,000 policies in Iowa, or in round figures 2 million dollars. These figures are the total amounts of the face of the policies. These policies went to the people who lived and got them. The figures do not include those who died, if any, in that year and got no policies.

All companies now do what defendant did. The statement at the bottom of Exhibit 1 contemplates 60 days for defendant to investigate and determine on a policy. To examine an applicant, mail the reports to Boston, and instigate the investigation defendant testified it was its underwriting practice to do, will take some time, but maybe not the 60 days they contemplate, so let us figure the premiums on 30 days. In round figures the premium in this case was $21 on $10,000 for three months, or roughly $7 a month. Thus if every insurance company delayed only one month before delivering the policy and then dated the

policy the date of the application (as defendant intended to do here) the people who lived and got policies in 1954 in Iowa paid to the insurance companies for insurance that did not exist the sum of $445,900, based on round figures. If each company took the full 60 days allowed itself under this receipt, then the "take" was $880,000 in round numbers. Nearly a million dollars collected in one state alone in one year for insurance that cannot be collected in the Eighth Circuit.

Public policy is not based upon what damage a scheme does to the individual litigant, but what effect the general rule of law is going to have on the rest of the community in the future. The opinion in the Eighth Circuit enables all insurance companies to collect up to 60 days back premium if they deliver a policy, and escape liability if the insured happened to get killed. It costs the people of Iowa anywhere from $14,666 to $880,000 a year for worthless insurance. If Iowa is typical of the other states, it would cost the people of America 48 times those amounts, or as much as 42 MILLION DOLLARS a year for interim premium. THE COURTS OF IOWA have declared in the two cases cited, *supra*, that such a result is an "injustice", and not to be permitted in Iowa, yet the Eighth Circuit defeats the Iowa Courts.

We submit that the rule for the circuits should be as stated in the Gault case, either by Judge Hand, read the contract the way an ordinary insured would read it, or by Judge Clark, to the effect that such contracts are effective as a matter of equity; either of which is the same as what the Iowa *decisions* declare.

III.

In a diversity case, the finding of the Court of Appeals that the applicable state law is the opposite of the rule announced by the highest court of the state in existing decisions of the state court, or the failure to mention or to follow those decisions, is not due process of law, in violation of the Fifth Amendment.

Erie Railway v. *Tompkins*, 304 U.S. 64.

It is of importance to all the lower federal courts, to clarify the real intent of the Erie case, as to whether it was intended to compel the federal court to be bound by the *decisions* of the highest court of the state, or whether it merely ordered the federal courts to find the *law* of the applicable state without following that state's *decisions*, so long as the federal court did not base its opinion on "general common law".

If the Erie rule means the latter, it serves no useful purpose. As stated by Judge Magruder in the First Circuit, in *Sampson* v. *Channell*, 110 F. 2d 754,

> "Until the point is finally ruled upon by the Supreme Court, lower courts must piece out as best they can the implications for the Tompkins case. The theory is that the federal court in Massachusetts sits as a court coordinate with the Massachusetts state courts to apply the Massachusetts law in diversity cases. Under Swift v. Tyson, *supra*, the federal courts were free to disregard state court *decisions* on matters of 'general law', and this included state court *decisions* on the common law relating to conflict of laws. * * * But under the Tompkins case the Massachusetts law must be determined by the state statutes and the common law *as interpreted by the state courts*, not by the federal court's notion of 'general law'."

When certiorari was denied in the Channel case, perhaps this Court approved the interpretation of the *Erie case* as given by Judge Magruder, 310 U.S. 650. The cases cited for dismissal herein, are not diversity cases and do not involve the evils sought to be avoided by Justice Brandeis, or those involved in removals for diversity reasons, and it would seem that the interpretation put upon the Erie rule by Judge Magruder would be more realistic, and more nearly accomplish the purpose of the Erie opinion, *i. e.*, the federal courts are bound by the *decisions* of the state court, not merely find in their own way the *state law*.

The evil that the Erie case sought to eliminate can best be avoided if the Court approves the statement from Goodrich, The Conflict of Laws (2d ed.) 24, as follows:

> "The final result (of the Tompkins case) is proper and desirable; it prevents a difference in *decision* depending upon whether suit is brought in the state or federal courts, and one more possibility of divergence based upon the fortuitous event of the forum chosen has been abolished."

The Court of Appeals refused to follow the Iowa *decision* on the following points of law: After erroneously finding the important fact as to whether the company determined Hinkle's insurability at its home office as required by Iowa decisions, the prevailing opinion holds on page 96, Transcript,

> "There was no time for investigation prior to applicant's death. Any delay in the investigation under such circumstances was in no way prejudicial to plaintiff."

Such ignores definite Iowa decisions relating to "mending his hold". Defendant pleaded in its answer, Transcript, p. 9, "that shortly after the death of W. Max Hinkle", Rod-

ney Bliss notified an attorney representing the plaintiff, "That the application for insurance on the life of W. Max Hinkle had never been completed because of the failure of Hinkle to take a physical examination and that no insurance on his life was in force". This pleading is corroborated by the testimony of Mrs. Hinkle on page 29 of the Transcript. Defendant denied liability for a different reason than it now claims on appeal, and the Court of Appeals by the statement above quoted rejected the Iowa *decisions* on "mending his hold" as stated in *Farmers Milling Co.* v. *Ins. Co.*, 127 Iowa 314, 103 N.W. 207, and such rejection is not due process.

Again, on page 92 of the Transcript, the prevailing opinion says the trial court erred in taking the position that good health and insurability were practically synonymous, and says, "While there are some authorities to support such position, the weight of authority and the better rule are contrary".

Such ignores the basic major premise of the Iowa decisions, namely, if a word has more than one meaning, it must be given the meaning most favorable to the insured, or the one who did not draft the document. See *Central N. R. Fire Ins. Co.* v. *Omaha L. Ins. Co.*, 194 Iowa 67, *ante*, and *Minnesota Linseed Oil Co.* v. *Montague & Smith*, *ante*.

Thus, under the Iowa decisions, if there is a split of authority on the meaning of a word, it is impossible for there to be a "weight of authority", for the same word, "insurable", might mean exactly the opposite in any two Iowa cases, because in one case one meaning might be more favorable to the insured, whereas in the next case the other meaning might be more favorable, and in the case at bar "good health" was the more favorable to the insured, and under the Iowa decisions the federal court was

required to give it that meaning, and such is what the trial court did, and the above is the reason for it, and it was not due process to reverse him on that point when he was following the Iowa *decisions*.

A matter of the greatest public importance to the lawyer and his clients at the "grass roots" is diversity cases where defendants remove to the federal courts or plaintiffs, and Tompkins did, commence cases in federal courts, for the obvious purpose of circumventing the *decisions* of the highest court of the state. The Erie case offered a partial solution, but if given a restricted application, does not cure the evil. Petitioners stated four propositions all of which are so interwoven that to separate them gives no solution to the national problem, and what the prevailing opinion did in this case illustrates all the evils that existed under *Swift* v. *Tyson*. If the Court can ignore state *decisions*, in determining the law of the state, the evil still exists unless such ignoring decisions is not due process. If the Court can find the facts contrary to the pleading and the evidence, as the majority did, as to whether the company determined in its usual course of passing on application that Hinkle was not insurable, the evil still exists, unless the Court will protect the parties under the Seventh Amendment guaranteeing a jury trial on disputed facts.

We submit this case is of public importance, for it illustrates all the evils of *Swift* v. *Tyson*, illustrates how federal courts can avoid the Erie rule and get a result different than the state court would reach; and further submit that the dissenting opinion of the court below is more in conformity with the Iowa decisions and with the Second and Sixth Circuits, and is the rule most to the public interest, and that the dissenting opinion should be made the law of this case, or at least that the whole problem presented by

diversity cases be solved by holding that a corporation is not a citizen for removal purposes, and the case, and all others like it, be remanded and solved in the state courts, where most diversity cases can best be handled.

Respectfully submitted,

L. S. FORREST,
Counsel for Petitioners.

CERTIFICATE.

I, L. S. Forrest, hereby certify that this petition is presented in good faith and not for delay.

L. S. FORREST,
Counsel for Petitioners.